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Uninsured Motorist Coverage: The Validity of Medical Payment Setoff Provisions

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UNINSURED MOTORIST COVERAGE: THE VALIDITY OF MEDICAL PAYMENT SETOFF PROVISIONS

Insurance was originally regarded as a mutual aid, an agreement whereby individuals would share excessive losses that could not be borne by a single member of the group without financial ruin.[1] This risk-sharing concept of insurance soon lost support as the insurance industry expanded to encompass automobile accident coverage, and the application of negligence rules to related torts motivated the public to think in strict terms of self-protection.[2] This self-interest which now pervades the insurance industry is nowhere more evident than in the area of uninsured motorist coverage. The relatively recent development of statutorily required uninsured motorist coverage[3] has pitted the insured party against his own carrier, each attempting to shift the economic loss to the other.[4]

The battle between insurer and insured is being viciously fought, each party refusing to yield to the demands of the other. The insured attempts to maximize his recovery through "stacking," a process by which the insured aggregates various uninsured motorist coverages to increase his claim.[5] The insurer attempts to combat the insured claim-

1. P. PRETZEL, UNINSURED MOTORISTS § 1 (1972); *see* S. KIMBALL, INSURANCE AND PUBLIC POLICY 4 (1960). *See generally* C. BRAINARD, AUTOMOBILE INSURANCE ch. 16 (1961).

2. P. PRETZEL, *supra* note 1, at 3. The majority of motorists *shift* (rather than share) the economic risk of injury or damage through the acquisition of automobile liability insurance. *See* A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 1.1 (1969). *See also* C. SUNDERLIN, SUNDERLIN ON AUTOMOBILE INSURANCE § 6 (1929).

3. On July 1, 1975, Maryland became the fiftieth state to statutorily require insurance companies to offer uninsured motorist coverage in all automobile insurance policies. *See* MD. INS. CODE ANN. art. 48A, § 541(c) (1975).

4. *See* P. PRETZEL, *supra* note 1, at 9. The insured seeking recovery from his own insurer must prove those same elements he would be expected to prove if the uninsured motorist were insured. "Since fault is relevant, the carrier will benefit if it can show that its own insured was negligent, the antithesis of its burden under the ordinary public liability portion of the policy." *Id.* at 16.

5. Attempts by an insured to "stack" or "pyramid" various types of automobile insurance coverages can be classified as either *inter-policy* stacking or *intra-policy* stacking.

"Intra-policy stacking [of uninsured motorist coverages] involves a *single policy*, . . .and allows insurance coverage to be aggregated or 'stacked' to fully compensate the insured for damages sustained." Comment, *Intra-Policy Stacking of Uninsured Motorist and Medical Payments Coverages: To Be or Not To Be*, 22 S.D.L. REV. 349, 350 (1977) (emphasis in original).

For example, a family may own four automobiles, all of which are covered under a single family automobile liability policy with each automobile carrying uninsured motorist coverage of

ant's use of stacking through an "other insurance" clause, a clause in the insurance policy which expressly bars the insured from using separate insurance coverages to supplement a claim.[6] The insurer also tries to limit his liability by inserting a "setoff" provision in the insurance policy. A "setoff" provision deducts from the insured's uninsured motorist recovery any amount paid or payable under the insured's medical payment coverage.[7]

The validity of medical payment setoffs has not yet been challenged in Oklahoma courts. This comment will examine the current legal status of these provisions in other jurisdictions and will predict the fate of setoff clauses in Oklahoma. In order to determine how Oklahoma will resolve the setoff issue, it is helpful to refer to two types of persuasive authorities. Judicial decisions from other states directly addressing the setoff question, as well as Oklahoma's treatment of analogous issues, will serve as tools in ultimately predicting the future judicial treatment of setoff provisions in Oklahoma.

$10,000 per person and $30,000 per accident. If a member of that family were injured in an accident with a negligent uninsured motorist, intra-policy stacking would allow a maximum recovery of $40,000 (coverage of $10,000 per person multiplied by the four units on the policy). *Id.* at 350.

Inter-policy stacking, on the other hand, involves more than one policy and allows insurance coverage from each policy to be stacked to maximize the insured's recovery. Such stacking, for purposes of the above example, would allow the same recovery as intra-policy stacking; it differs only in that it involves several policies rather than four units of a single policy. *Id.*

See generally P. PRETZEL, *supra* note 1, § 25.5B. For current information on stacking, see A. WIDISS, *supra* note 2, § 2.60 (Supp. 1981).

6. An example of a typical "other insurance" clause reads:

> [I]f the insured has other similar insurance available to him, and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this Uninsured Motorist Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.
>
> Subject to the foregoing. . . , if the insured has *other similar insurance* available to him against a loss caused by the Uninsured Motorist Coverage of this policy, *the company shall not be liable under this policy for a greater proportion of such loss* than the applicable limit of liability herein bears to the total applicable limits of liability of all valid and collectible insurance against such loss.

Bose v. American Family Mut. Ins. Co., 186 Neb. 209, —, 181 N.W.2d 839, 840 (1970) (emphasis added); *see* P. PRETZEL, *supra* note 1, § 25.5, at 81. ("other insurance" clause). *See generally* A. WIDISS, *supra* note 2, §§ 2.60-.61.

7. An example of a typical "setoff" provision reads: "The company shall not be obligated to pay under this coverage that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under Part II [Medical Payment Coverage]." Connelley v. Southern Farm Bureau Cas. Co., 219 So. 2d 206, 208 (La. Ct. App. 1969).

I. SETOFFS: A MATTER OF STATUTORY INTERPRETATION

Before examining the validity of medical payment setoff provisions, the consequences of a typical setoff provision can be illustrated through the following hypothetical. Al purchased automobile insurance from Faith Insurers. Under Coverage A in his policy, Al held liability insurance. Coverage B provided Al with medical payment insurance and Coverage C gave Al protection against uninsured motorists. One afternoon, Al was injured in an automobile accident with Ed—an uninsured motorist. Ed was completely at fault. Al examined Coverages B and C of his policy and found that he was covered up to $2,000 in medical payment coverage and up to $10,000 in uninsured motorist coverage. As Al's injuries from the accident were in excess of $12,000, he filed a claim with Faith Insurers for the full amount. Faith pointed out Clause D in Al's policy which provided: "any amounts payable or paid under Coverage B will be deducted from payments under Coverage C of this policy." In other words, Al's receipt of $2,000 in medical payments limited his uninsured motorist recovery to $8,000.[8]

Although Al's reduced recovery is typical of the plight of insured claimants nationwide, litigation involving setoff provisions has been minimal.[9] The primary reason for this scarcity of litigation is a matter of dollars and cents: the amount of financial remuneration involved (usually $3,000 or below), often does not warrant a long and expensive appellate attack against the insurer's use of a setoff provision.[10]

In those jurisdictions, however, which have determined the validity of setoff provisions, the central consideration has been the interpretation of the applicable uninsured motorist statute.[11] Oklahoma's uninsured motorist statute[12] is typical of those in other states.[13] It pro-

8. *See* Robey v. Northwestern Sec. Ins. Co., 270 F. Supp. 466 (W.D. Ark. 1967) (source of facts in hypothetical).

9. P. PRETZEL, *supra* note 1, at 51.

10. *See* 1 U.S. DEP'T OF TRANSPORTATION, AUTOMOBILE PERSONAL INJURY CLAIMS 101 (1970) states: "About one-third of the motor vehicles did not provide for medical payment benefits. Most of the others had coverage limits ranging between $500 and $2000. About one out of ten had limits above $2000."

11. *See, e.g.*, Boehler v. Insurance Co. of N. Am., 290 F. Supp. 867 (E.D. Ark. 1968); Robey v. Northwestern Sec. Ins. Co., 270 F. Supp. 466, 471 (W.D. Ark. 1967); Simpson v. Farmers Ins. Co., 225 Kan. 508, —, 592 P.2d 445, 447 (1979); Protective Fire & Cas. Co. v. Woten, 186 Neb. 212, —, 181 N.W.2d 835, 838 (1970); Fernandez v. Selected Risks Ins. Co., 163 N.J. Super. 270, —, 394 A.2d 877,879 (App. Div. 1978); Finney v. Farmers Ins. Co., 92 Wash.2d 748, 752, 600 P.2d 1272, 1275 (1979).

12. OKLA. STAT. tit. 36, § 3636 (Supp. 1980):

vides, in relevant part, that no policy insuring a loss arising out of one's use of an automobile can be issued, unless it provides coverage for the protection of those who are legally entitled to recover damages from uninsured motorists.[14] The statute further provides that "[c]overage shall be not less than the amounts or limits prescribed for bodily injury or death for a policy meeting the requirements of Section 7-204 of Title 47, Oklahoma Statutes."[15] Since the "minimum coverage" provision is at the very heart of the setoff issue, the validity of medical payment setoffs depends on the interpretation given this statute.

There appear to be two judicial interpretations of the minimum coverage provision. One is founded on the belief that the applicable uninsured motorist statute was enacted solely to provide broad protection for innocent insured parties from the negligence of uninsured tortfeasors.[16] Courts adopting this view construe the minimum cover-

(A) No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection (B) of this section.

(B) The policy referred to in subsection (A) of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall be not less than the amounts or limits prescribed for bodily injury or death for a policy meeting the requirements of Section 7-204 of Title 47, Oklahoma Statutes, as the same may be hereafter amended; provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured. . . .

13. *Compare* OKLA. STAT. tit. 36, § 3636 (Supp. 1980) *with* KAN. STAT. ANN. § 40-284 (1973) *and* GA. CODE ANN. § 56-407.1 (Supp. 1981). *But cf.* CAL. INS. CODE § 11580.2 (Supp. 1981) (expressly allowing medical payment setoffs). Although no two states have identical uninsured motorist statutes, most uninsured statutes are substantively the same.

14. OKLA. STAT. tit. 36, § 3636(A), (B) (Supp. 1980).

15. *Id.* § (B); *see* OKLA. STAT. tit. 47, § 7-204 (Supp. 1980):

(a) No policy or bond shall be effective under Section 7-203 . . . unless issued by an insurance company or surety company authorized to do business in this state, except as provided in subdivision (b) of this section, nor unless such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than Ten Thousand Dollars ($10,000) because of bodily injury to or death of one person in any one accident and, subject to said limit of one person, to a limit of not less than Twenty Thousand Dollars ($20,000) because of bodily injury to or death of two or more persons in any one accident, and if the accident has resulted in injury to or destruction of property to a limit of not less than Ten Thousand Dollars ($10,000) because of injury to or destruction of property of others in any one accident.

16. *See, e.g.*, Protective Fire & Cas. Co. v. Woten, 186 Neb. 212, —, 181 N.W.2d 835, 837 (1970) (declaring that the Nebraska uninsured motorist statute "was enacted for the benefit of the innocent victim[s] of financially irresponsible motorist[s]"); Fernandez v. Selected Risks Ins. Co., 163 N.J. Super. 270, —, 394 A.2d 877, 879 (1978) (stating that a strong public policy exists "to provide broad protection for the victims of automobile accidents caused by the negligence of uninsured motorists").

age provision liberally and denounce all attempts by insurers to restrict uninsured motorist liability as being repugnant to legislative purpose.[17]

The other interpretation of the minimum coverage provision is based on the conviction that the uninsured motorist statute was enacted to allow the injured party to recover only those damages that he would have recovered had the responsible party maintained liability insurance.[18] These courts narrowly construe the minimum coverage provision and limit the insured claimant's uninsured motorist recovery to the amount of the wrongdoer's would-be liability coverage.[19]

The amount of the claimant's recovery will depend largely on the court's interpretation of the applicable uninsured motorist statute. Examining litigation of the setoff issue in jurisdictions other than Oklahoma will show how courts deem medical payment setoffs as either consistent or inconsistent with legislative intent.

II. MEDICAL PAYMENT SETOFFS ARE VALID

A. *Prevention of Double Recovery*

Jurisdictions which support the validity of medical payment setoffs against uninsured motorist recoveries interpret the applicable statute as being intended to prevent double recovery by the insured.[20] This argu-

17. *See* Protective Fire & Cas. Co. v. Woten, 186 Neb. 212, 181 N.W.2d. 835 (1970). The court held an "other insurance" clause invalid, stating: "Policy provisions which conflict with requirements of the uninsured motorist statute will not be effective to reduce an insured's recovery below the amount necessary to fully indemnify him for his loss within the limits of all applicable policies." *Id.* at 838. Another court expressed a similar sentiment in stating that: "[A]ny attempt by an insurer to restrict the liability on [an uninsured motorist] endorsement . . . is repugnant to both the intent and meaning of the statute. The policy must be given effect in accordance with the Legislature." Fernandez v. Selected Risks Ins. Co., 163 N.J. Super. 270, —, 394 A.2d 877, 880 (App. Div. 1978) (citing Beek v. Ohio Cas. Ins. Co., 135 N.J. Super. 1, 5, 342 A.2d 547, 549 (App. Div. 1975)); *accord*, Simpson v. Farmers Ins. Co., 225 Kan. 508, 592 P.2d 445 (1979); Saffore v. Atlantic Cas. Ins. Co., 21 N.J. 300, 121 A.2d 543 (1956); Pasterchick v. Insurance Co. of N. Am., 150 N.J. Super. 90, 374 A.2d 1243 (App. Div. 1977).

18. Finney v. Farmers Ins. Co., 92 Wash. 2d 748, 751, 600 P.2d 1272, 1275 (1979); *see, e.g.*, Weemhoff v. Cincinnati Ins. Co., 41 Ohio St. 2d 231, —, 325 N.E.2d 239, 241 (1975) (interpreting the Ohio statute as intended "to protect persons injured in automobile accidents from losses which, because of the tortfeasor's lack of liability coverage, would otherwise go uncompensated"); Day v. State Farm Mut. Ins. Co., 261 Pa. Super. 216, 396 A.2d 3 (1978); State Farm Mut. Auto. Ins. Co. v. Bafus, 77 Wash. 2d 720, 724, 466 P.2d 159, 161 (1970) (stating that the "insurance carrier which issued the policy stands . . . in the shoes of the uninsured motorist to the extent of the carrier's policy limits").

19. *See* Finney v. Farmers Ins. Co., 92 Wash. 2d 748, 600 P.2d 1272 (1979). The court denied the insured claimant the right to stack his uninsured motorist coverages, reasoning that his recovery must be limited to the wrongdoer's liability coverage as if the wrongdoer had been insured. *Id.* at 751, 600 P.2d at 1275; *accord*, Weemhoff v. Cincinnati Ins. Co., 41 Ohio St. 2d 231, —, 325 N.E.2d 239, 243 (1975).

20. *See* Canizzo v. Guarantee Ins. Co., 245 Cal. App. 2d 70, 53 Cal. Rptr. 657 (1966) (em-

ment focuses on the belief that the insured's receipt of both medical payment and uninsured motorist damages would overcompensate him for his injuries.

This fear of the insured enjoying a double recovery is evidenced in *Cole v. Inland National Insurance Co.*[21] In that case, the court allowed the insurance company's medical payment setoff[22] because the insured claimant could be fully compensated under his uninsured motorist coverage. Espousing the double recovery rationale, the court stated:

> It is our view that there is no policy consideration underlying uninsured motorist coverage which requires an application of the insurance policy provisions which will result in double payment of medical expenses. Permitting deduction of the payment made under the medical expense coverage as is provided by a provision of the policy, avoids double payment of this expense by the insurer without reducing the protection afforded the insured under the uninsured motorist coverage.[23]

The double recovery theory focuses on the windfall enjoyed by the insured,[24] while simultaneously considering the undue hardship which double payment imposes on the insurer.[25]

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ploying CAL. INS. CODE § 11580.2(e) to allow setoff); Connelley v. Southern Farm Bureau Cas. Co., 219 So. 2d 206 (La. Ct. App. 1969). *But see* Wilkinson v. Fireman's Fund Ins. Co., 298 So. 2d 915 (La. Ct. App. 1974) (enforcing medical payment setoff only if necessary to prevent duplication of recovery); Miller v. Cosmopolitan Mut. Ins. Co., 33 A.D.2d 916, 307 N.Y.S.2d 592 (1970); Jenkins v. State Farm Mut. Auto. Ins. Co., [1970] AUTO. INS. CAS. (CCH) ¶ 6711.

21. 133 Ill. App. 2d 745, 273 N.E.2d 65 (1971).

22. The setoff provision provided: "The company shall not be obligated to pay under this Coverage that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under Part 2." *Id.* at —, 273 N.E.2d at 66.

23. *Id.* at —, 273 N.E.2d at 67; *accord*, Ramsden v. Government Employees Ins. Co., 123 Ga. App. 163, 179 S.E.2d 671 (1971); Laurie v. Holland Am. Ins. Co., 31 Ill. App. 2d 437, 176 N.E.2d 678 (1961); Weemhoff v. Cincinnati Ins. Co., 41 Ohio St. 2d 231, 234, 325 N.E.2d 239, 243 (1975). *Contra*, Van Tassel v. Horace Mann Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1973). Addressing the validity of medical payment setoffs in *Van Tassel*, the court considered the windfall argument stating: "But if the question must be resolved on the basis of who gets a windfall, it seems more just that the insured who has paid a premium should get all he paid for rather than that the insurer should escape liability for that which it collected a premium." *Id.* at —, 207 N.W.2d at 352. *See also* Note, *Uninsured Motorist Coverage—Setoff of Amounts Payable Under Medical Payments Coverage*, 23 U. MIAMI L. REV. 249, 251 (1969).

24. *See* State Farm Mut. Auto. Ins. Co. v. Harper, 125 Ga. App. 696, —, 188 S.E.2d 813, 817 (1972). The court stated that "[i]t seems clear the policy of the Uninsured Motorists Act is not to allow an insured to 'stack coverage' in order to recover amounts in excess of his actual damages."

25. *See* Miller v. Cosmopolitan Mut. Ins. Co., 33 A.D.2d 916, —, 307 N.Y.S.2d 592, 594 (1970) (enforcing the setoff provision in order to prevent a "duplicate medical payment of $151").

B. *Clear Meaning Rule*

A second rationale used by courts to uphold the validity of medical payment setoffs against uninsured motorist coverage is the "clear meaning" rule. This interpretation dictates that if the terms of a setoff provision are clear and unambiguous, the provision is valid.[26] The clear meaning rule was used to uphold a medical payment setoff provision in *Morgan v. State Farm Mutual Automobile Insurance Co*.[27] In that case, five automobile passengers suffered serious injuries in a collision with an uninsured motorist. Since the damages suffered by the injured parties were extensive, there was no threat of the insured parties receiving a double recovery.[28] Nevertheless, the court enforced the setoff provision based upon the clear language of the insurance policy. The court reasoned that "[t]he insurer has a right to limit its liability in any way it chooses; and these limitations will be enforced so long as they are not ambiguous, or contrary to statute or public policy."[29]

Implicit in the clear meaning rule is a judicial reluctance to interfere in contracts agreed to by competent parties.[30] Expressing this sentiment, one court stated: "If no ambiguity exists in the terms of the insurance policy, a court cannot remake the contract, but must enforce it as the parties made it."[31] The antithesis to the *Morgan* holding is that ambiguous language will be interpreted in favor of the insured.[32] A determination of whether language is ambiguous is left to the discre-

26. *See, e.g.*, Boehler v. Insurance Co. of N. Am., 290 F. Supp. 867 (E.D. Ark. 1968); Robey v. Northwestern Sec. Ins. Co., 270 F. Supp. 466 (W.D. Ark. 1967); Robinson v. Allstate Ins. Co., 267 So. 2d 257 (La. Ct. App. 1972); Bailes v. Southern Farm Bureau Cas. Ins. Co., 252 So. 2d 123 (La. Ct. App. 1971), *cert. denied*, 409 U.S. 872 (1972); Connelley v. Southern Farm Bureau Cas. Co., 219 So. 2d 206 (La. Ct. App. 1969). *See generally* A. WIDISS, *supra* note 2, at 117.

27. 195 So. 2d 648 (La. Ct. App. 1967).

28. *Id.* at 650.

29. *Id.*; *accord*, Robinson v. Allstate Ins. Co., 267 So. 2d 257, 258 (La. Ct. App. 1972); Connelley v. Southern Farm Bureau Cas. Co., 219 So. 2d 206, 209 (La. Ct. App. 1969); New York Life Ins. Co. v. Hollender, 38 Cal. 2d 73, 75, 237 P.2d 510, 513 (1951); *cf.* United Serv. Auto. Ass'n v. Smith, 57 Ala. App. 506, —, 329 So. 2d 562, 564 (Civ. App. 1976) (clear meaning rule used to enforce other insurance clause).

30. *See* Colonial Life & Accident Ins. Co. v. Collins, 280 Ala. 373, 194 So. 2d 532 (1967); Ogburn v. Travelers Ins. Co., 207 Cal. 50, 276 P. 1004 (1929); Pettid v. Edwards, 195 Neb. 713, 240 N.W.2d 344 (1976).

31. United Serv. Auto. Ass'n v. Smith, 57 Ala. App. 506, —, 329 So. 2d 562, 565 (Civ. App. 1976); *see* Colonial Life & Accident Ins. Co. v. Collins, 280 Ala. 373, —, 194 So. 2d 532, 535 (1967).

32. Wittig v. United Serv. Auto. Ass'n, 300 F. Supp. 679 (N.D. Ind. 1969); *accord*, Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 296 P.2d 801 (1956); Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N.W.2d 133 (1968); Lonsdale v. Union Ins. Co., 167 Neb. 56, 91 N.W.2d 245 (1958).

tion of the trial court.[33]

III. MEDICAL PAYMENTS SETOFFS ARE INVALID

A. *Minimum Statutory Rule*

Those courts which determine that setoff provisions are invalid[34] interpret such provisions as void against public policy because they attempt to reduce uninsured motorist coverage below that required by statute.[35] Assume for instance, that State C enacted an uninsured motorist statute which required that all insurance carriers provide their insured with $20,000 uninsured motorist coverage. Duncan purchases minimal uninsured motorist coverage and is injured in a collision with Gaines, an uninsured motorist. Duncan's insurance policy contains a medical payment setoff provision. As Duncan is to receive $5,000 under his medical payment coverage, this amount, if set off against his

33. Wittig v. United Serv. Auto. Ass'n, 300 F. Supp. 679, 680-81 (N.D. Ind. 1969). In *Wittig*, the policy provided that the "insured may not recover sums under the uninsured motorist coverage representing expenses paid or payable under medical coverage." The court found the clause susceptible to two interpretations: (1) any sum recovered or recoverable under medical payment coverage is to be deducted from the uninsured motorist coverage, and (2) only sums which exceed the insured's damages may be deducted from his uninsured motorist coverage. The court concluded that, as the clause was ambiguous, the interpretation more favorable to the insured claimant would be applied. *Id.* at 681.

34. *See* Alabama Farm Bureau Mut. Cas. Ins. Co. v. Humphrey, 54 Ala. App. 343, 308 So. 2d 255 (1975); McCarthy v. Preferred Risk Mut. Ins. Co., 454 F.2d 393 (9th Cir. 1972) (Arizona law); Bacchus v. Farmers Ins. Group Exch., 106 Ariz. 280, 475 P.2d 264 (1970); Heiss v. Aetna Cas. & Sur. Co., 250 Ark. 474, 465 S.W.2d 699 (1971); Tuggle v. Government Employees Ins. Co., 207 So. 2d 674 (Fla. 1968); Phillips v. State Farm Mut. Auto. Ins. Co., 437 F.2d 365 (5th Cir. 1971) (Georgia law); State Farm Mut. Auto. Ins. Co. v. Johnson, 126 Ga. App. 45, 190 S.E.2d 113 (1972); Glidden v. Farmers Auto. Ins. Ass'n, 57 Ill. 2d 330, 312 N.E.2d 247 (1974); Melson v. Illinois Nat. Ins. Co., 1 Ill. App. 3d 1025, 274 N.E.2d 664 (1971); Wittig v. United Serv. Auto. Ass'n, 300 F. Supp. 679 (N.D. Ind. 1969); Ohio Cas. Ins. Co. v. Berger, 311 F. Supp. 840 (E.D. Ky. 1970); Meridian Mut. Ins. Co. v. Siddons, 451 S.W.2d 831 (Ky. 1970); Santillanes v. Banks, 86 Mich. App. 615, 273 N.W.2d 83 (1977); Keyes v. Beneficial Ins. Co., 39 Mich. App. 450, 197 N.W.2d 907 (1972); Van Tassel v. Horace Mann Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1978); Pleitgen v. Farmers Ins. Exch., 296 Minn. 191, 207 N.W.2d 535 (1973); Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699 (Miss. 1974); French v. Farmers Ins. Co., 354 F. Supp. 105 (E.D. Mo. 1972); Webb v. State Farm Mut. Auto. Ins. Co., 479 S.W.2d 148 (Mo. Ct. App. 1972); Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N.W.2d 133 (1968); Silas v. Allstate Ins. Co., 129 N.J. Super. 99, 322 A.2d 464 (App. Div. 1974); Shearer v. Motorists Mut. Ins. Co., 53 Ohio St. 2d 1, 371 N.E.2d 210 (1978); Weemhoff v. Cincinnati Ins. Co., 37 Ohio Misc. 14, 306 N.E.2d 194 (1973); Kinkead v. Buckeye Union Ins. Co., 28 Ohio Misc. 207, 276 N.E.2d 673 (1970); Bogart v. Twin City Fire Ins. Co., 473 F.2d 619 (5th Cir. 1973) (Texas law); Westchester Fire Ins. Co. v. Tucker, 512 S.W.2d 679 (Tex. 1974); Lyon v. Hartford Accident & Indem. Co., 25 Utah 2d 311, 480 P.2d 739 (1971); Moomaw v. State Farm Mut. Auto. Ins. Co., 379 F. Supp. 697 (S.D.W. Va. 1974); Tulley v. State Farm Mut. Auto. Ins. Co., 345 F. Supp. 1123 (S.D.W. Va. 1972).

35. *See, e.g.*, Damsel v. State Farm Mut. Auto. Ins. Co., 207 So. 2d 681 (Fla. 1968); Tuggle v. Government Employees Ins. Co., 207 So. 2d 674 (Fla. 1968) (*Damsel* was a companion case to *Tuggle*, as the two cases were considered factually identical).

uninsured motorist coverage, would reduce Duncan's recovery to $15,000, an amount below the statutory minimum.[36]

A case illustrating the minimum statutory rule and holding medical payment setoffs invalid is *Tuggle v. Government Employees Insurance Co*.[37] The Florida Supreme Court confronted the carrier's clear meaning assertion with the public policy argument inherent in the minimum statutory rule.

> In view of the fact that the two classes of coverage involved in the policy under consideration were contracted separately, with independent premiums, we are unable to distinguish this situation from that . . . relating to multiple carriers. Nor does there appear to be any basis for treating the set-off provision as amounting only to a contractual reduction of medical benefits, contrary to the actual language of the policy stating in the provision for uninsured motorist coverage that the company shall not be obligated to pay any part of such liability which represents expense "payable" by the insurer under its medical benefits coverage. The clause on its face is one to decrease uninsured motorist coverage beneath the statutory minimum, and one which means that under certain conditions (medical benefits in excess of $10,000) there will be no uninsured motorist coverage whatever.[38]

In holding for the insured, the court recognized that if the setoff clause were held valid, uninsured motorist coverage at the statutory minimum level would be useless where medical payment coverage is at or above that amount.[39]

The argument is that setoff provisions can operate to frustrate the purpose of the legislature by reducing uninsured motorist coverage below that mandated by statute. This contention reasons that legislative intent for enacting minimum uninsured motorist protections cannot be thwarted by use of the clear meaning rule assertions of the insured that the parties are free to contract away the statutory minimum.[40]

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36. *See* Phillips v. State Farm Mut. Auto. Ins. Co., 437 F.2d 365 (5th Cir. 1971) (source of facts in hypothetical).

37. 207 So. 2d 674 (Fla. 1968).

38. *Id.* at 675.

39. *Id.*; *accord*, Phillips v. State Farm Mut. Auto. Ins. Co., 437 F.2d 365 (5th Cir. 1971); State Farm Mut. Auto. Ins. Co. v. Carrico, 200 So. 2d 265 (Fla. 1967).

40. *See* Phillips v. State Farm Mut. Auto. Ins. Co., 437 F.2d 365 (5th Cir. 1971); Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N.W.2d 133 (1968). In *Stephens*, the court stated: "A provision, drawn by the insurer to comply with the statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute." *Id.* at —, 156 N.W.2d at 136. The court later explained that "[t]he proper construction of this . . . [provision]

B. *Separate Contract Rationale*

Medical payment setoffs are also invalidated on the basis of a "separate contract" rationale. Courts employing this theory reason that since each type of coverage purchased by the insured (liability, medical payment, uninsured motorist) demands payment of a separate premium, each coverage constitutes a separate contract. As these separate protections are unrelated to each other, Coverage A, for example, cannot be deducted from Coverage B to reduce the amount of the insured's recovery.[41]

This theory is sometimes used to refute the double recovery rationale. In the 1965 Florida case of *Sims v. National Casualty Co.*,[42] the court held that the windfall or double indemnity argument for upholding setoffs was inapplicable when separate premiums were paid for medical payment and uninsured motorist coverages.[43] The *Sims* court reasoned that the insured claimant's uninsured motorist and medical payment coverages were separate contracts bound by independent considerations, and that the insured's receipt of medical payments would not affect the amount of his uninsured motorist recovery.[44]

Courts use the separate contract rationale to invalidate medical payment setoffs against uninsured motorist coverage in an attempt to fulfill the expectations of the insured claimant.[45] The insured party

should not be an exercise in the blind semantics of literal language construction." *Id.* at —, 156 N.W.2d at 138.

41. *See, e.g.*, Employers Nat'l Ins. Co. v. Parker, 286 Ala. 42, 236 So. 2d 699 (1970); Alabama Farm Bureau Mut. Cas. Ins. Co. v. Humphrey, 54 Ala. App. 343, 308 So. 2d 255 (Civ. App. 1975); Bacchus v. Farmers Ins. Group Exch., 106 Ariz. 280, 475 P.2d 264 (1970); Tuggle v. Government Employees Ins. Co., 207 So. 2d 674 (Fla. 1968); Sims v. National Cas. Co., 171 So. 2d 399 (Fla. Dist. Ct. App. 1965); Boettner v. State Farm Mut. Ins. Co., 388 Mich. 482, 201 N.W.2d 795 (1972); Fletcher v. Aetna Cas. & Sur. Co., 80 Mich. App. 439, 264 N.W.2d 19 (1978); Citizens Mut. Ins. Co. v. Turner, 53 Mich. App. 616, 220 N.W.2d 203 (1974); Keyes v. Beneficial Ins. Co., 39 Mich. App. 450, 197 N.W.2d 907 (1972); Van Tassel v. Horace Mann Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1973); *cf.* Bose v. American Family Mut. Ins. Co., 186 Neb. 209, 181 N.W.2d 839 (1970) (case in which the "separate contract" rationale was used to allow the stacking of coverages); Allstate Ins. Co. v. Maglish, 94 Nev. 699, 586 P.2d 313 (1978) (stacking allowed). *See also* A. WIDISS, *supra* note 2, § 2.62; P. PRETZEL, *supra* note 1, § 22.6.

42. 171 So. 2d 399 (Fla. Dist. Ct. App. 1965).

43. *Id.* at 400.

44. The *Sims* opinion stated that the insurer was called upon "to comply with two separate contract provisions by which . . . it . . . agreed to pay (1) the amount due [the] insured from an uninsured driver [uninsured motorist coverage], and (2) [the] insured's medical expenses . . . . [T]he fact that the damages recoverable from the uninsured driver included medical expenses was immaterial." *Id.*

45. *See* Keyes v. Beneficial Ins. Co., 39 Mich. App. 450, 197 N.W.2d 907 (1972); *cf.* Allstate Ins. Co. v. Maglish, 94 Nev. 699, 586 P.2d 313 (1978) (allowing the insured to stack coverages to the full extent for which he has paid the premiums).

pays separate premiums with the expectation that he will receive separate payments if a claim arises.[46] The courts thus simultaneously adhere to the fundamental concept of independent contracts and prevent the insurer from frustrating the insured's expectations.[47]

C. *Collateral Source Rule*

A third method of defeating medical payment setoffs against uninsured motorist coverage is based upon the "collateral source" rule which prevents a wrongdoer from mitigating his damages by showing payment to the injured party from a source unrelated to himself.[48] Some courts reason that the insurer is not "the wrongdoer" who is attempting to mitigate his damages, and therefore the collateral source rule does not apply to insurers.[49] These courts are simply unwilling to extend this punitive rule, originally aimed at the wrongdoer, to "an insurer who is doing the paying out of a fund created by the injured party."[50]

Refusing to apply the collateral source rule to insurers, however, indicates judicial insensitivity to the primary purpose of uninsured motorist coverage: "to pay the insured the damages he would normally be entitled to receive for bodily injuries caused" by an uninsured motorist

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46. Van Tassel v. Horace Mann Ins. Co., 296 Minn. 181, —, 207 N.W.2d 348, 353-54 (1978). The court stated:

> We are convinced that plaintiffs should get what they paid for and that medical coverage is a separate part of the contract from uninsured-motorist coverage. The medical insurance was not bought and paid for by the insured for the benefit of the insurer. Consequently, medical insurance may not be used to dilute the statutorily mandated uninsured-motorist coverage.

Id. For the court's comment on the "windfall" argument, *see* note 23 *supra*.

47. *See* Employers Nat'l Ins. Co. v. Parker, 286 Ala. 42, —, 236 So. 2d 699, 705 (1970). The court stated: "Having promised, in the event of an accident, to provide medical payments coverage for a consideration of $3.00 and having promised to provide uninsured motorists coverage for an independent consideration of $2.00 . . . [the insurer] cannot now be heard to complain if it is held to both promises." *Id.*

48. *See, e.g.*, Phoenix Ins. Co. v. Kincaid, 199 So. 2d 770 (Fla. Dist. Ct. App. 1967); Standard Accident Ins. Co. v. Gavin, 184 So. 2d 229 (Fla. Dist. Ct. App. 1966); Hack v. Great Am. Ins. Co., 175 So. 2d 594 (Fla. Dist. Ct. App. 1965); Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N.W.2d 133 (1968); *cf.* Sellers v. United States Fidelity & Guar. Co., 185 So. 2d 689 (Fla. 1966) (invalidating other insurance clause and allowing stacking). *But cf.* State Farm Mut. Auto. Ins. Co. v. Bafus, 77 Wash. 2d 720, 466 P.2d 159 (1970) (upholding other insurance clause). *See generally* Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962); *see also* M. WOODROOF, AUTOMOBILE LIABILITY AND THE CHANGING LAW 16 (1972).

49. Burcham v. Farmers Ins. Exch., 255 Iowa 69, 121 N.W.2d 500 (1963); *see, e.g.*, State Farm Mut. Ins. Co. v. Bafus, 77 Wash. 2d 720, 466 P.2d 159 (1970).

50. Note, *Uninsured Motorist Coverage—Setoff of Amounts Payable Under Medical Payments Coverage*, 23 U. MIAMI L. REV. 249, 255 (1969).

who is legally at fault.[51] In other words, uninsured motorist coverage is statutorily mandated to place the insurer in the shoes of the wrongdoer for the purpose of compensating the injured party.[52]

With this purpose in mind, the following hypothetical illustrates the collateral source dilemma. Jan was seriously injured in a car accident when Kate, an insured motorist, negligently ran a red light and sideswiped Jan's car. Jan was hospitalized and immediately made a claim under her own medical payment coverage for the full amount, $5,000. Two months later, Jan was released from the hospital. She assessed her expenses and damages at $20,000. Jan then sued Kate for $20,000, who claimed the $20,000 on her liability coverage. Kate's insurer mailed Jan a check for the full amount, as the collateral source rule precluded the insurance company from mitigating its liability through a showing of Jan's previously received medical payments. Jan was thus able to recover $25,000.

Assume now that Kate was uninsured. The medical payment setoff provision in Jan's policy would, if valid, limit Jan's recovery to $20,000. This result, however, would be inconsistent with the purpose of the uninsured motorist coverage that the injured party be compensated as if the wrongdoer possessed liability insurance. It is therefore necessary, if the legislative purpose is to be satisfied, that Jan's insurer be treated as the wrongdoer for the purposes of applying the collateral source rule.[53]

A Florida court applied the collateral source rule to the setoff issue in *Phoenix Insurance Co. v. Kincaid*.[54] The court recognized that the insured claimant could have received both medical payment and liability compensation from the wrongdoer, had the wrongdoer been insured. Applying the fiction that the insurer wears the shoes of the uninsured wrongdoer, *Kincaid* held that the insured claimant was entitled to both medical payment and uninsured motorist recovery.[55]

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51. P. PRETZEL, *supra* note 1, at 21; *see* Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, —, 156 N.W.2d 133, 139 (1968). The court held a medical payment setoff to be invalid because "the insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance." *Id.*

52. P. PRETZEL, *supra* note 1, at 46.

53. *See* Phoenix Ins. Co. v. Kincaid, 199 So. 2d 770 (Fla. Dist. Ct. App. 1967) (source of facts in hypothetical).

54. *Id.* Mr. and Mrs. Kincaid were injured in an automobile accident with an uninsured motorist. They were to have been paid $10,000 from their medical payments coverage, but § 6(d) of their policy sought to deduct medical payments from their uninsured medical coverage. The Kincaids then challenged the validity of § 6(d). *Id.* at 771.

55. *Id.* at 772.

IV. Is There a Majority Rule?

Automobile insurance is a matter of state concern which is regulated by statute.[56] Due to the local character of uninsured motorist coverage, no uniform rule can be identified nationwide. While some authorities are hesitant to recognize a majority rule on the setoff issue,[57] there is evidence of a trend toward holding such setoffs unenforceable.[58] An examination of the jurisdictions that have litigated the setoff issue reveals that eighteen states have held medical payment setoffs invalid while only four states have enforced such setoffs.[59] One court summarized the overall trend: "The *general rule* is that an insurer *may not* limit its liability under uninsured motorist coverage by setoffs . . . or medical payment reduction clauses."[60]

V. Will Oklahoma Follow the Trend and Hold Medical Payment Setoffs Invalid?

The validity of medical payment setoffs has not yet been litigated in Oklahoma. Litigation of analogous issues, however, reveals a judicial attitude that favors the insured. Examination of these related issues will hopefully indicate the probable fate of the setoff question in Oklahoma.

A. *Oklahoma's Treatment of Analogous Issues*

In 1976, the Oklahoma Supreme Court confronted the stacking issue in *Keel v. MFA Insurance Co.*,[61] and held that other insurance

56. C. Sunderlin, Sunderlin on Automobile Insurance 4 (1929) states: "The insurance business is charged with a public interest and as such is subject to the police power of the state and subject to state control and supervision."

57. *See, e.g.*, Note, *Uninsured Motorist Coverage—Setoff of Amounts Payable under Medical Payments Coverage*, 23 U. Miami L. Rev. 249, 254 (1969) ("Since the cases involve interpretation of statutes which vary from state to state, it would be meaningless to attempt to formulate a 'majority' position on the acceptance or rejection of such provisions.")

58. P. Pretzel, *supra* note 1, at 51 ("There is at least some evidence of a trend toward allowing full collection up to the full amount of the uninsured motorist coverage in addition to such medical payments as are due under the medical payment coverage."); A. Widiss, *supra* note 2, at 216 ("[I]t is fair to conclude that there is a clear trend developing under which the clauses are held to be unenforceable.").

59. California, Louisiana, New York, and Tennessee have held setoffs valid. *See* notes 20-33 *supra* and accompanying text. Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Ohio, Texas, Utah, and West Virginia have held setoffs invalid. *See* notes 34-55 *supra* and accompanying text.

60. Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, —, 156 N.W.2d 133, 139 (1968) (emphasis added).

61. 553 P.2d 153 (Okla. 1976). In this case, Robert Keel was injured when the car he was driving was struck by a car driven by an uninsured motorist. Keel had purchased two insurance

clauses were ineffective to preclude the insured from stacking his uninsured motorist coverages.[62] The court, employing the separate contract argument,[63] reasoned that the other insurance clause was contrary to public policy because Keel had paid separate premiums for the coverages and was thus entitled to the benefits of each.[64] The court also addressed the windfall argument and used it against the insurer, stating that the other insurance clause, if upheld, would allow the insurer to reap the benefits incidental to its collection of the separate premiums while permitting the company to avoid its obligation to pay the insured claimant his legal entitlement.[65] Under this analysis, the Oklahoma Supreme Court determined the stacking issue in favor of the insured.

In 1977, the Oklahoma Supreme Court decided *Biggs v. State Farm Mutual Automobile Insurance Co.*,[66] which considered the validity of a provision requiring "physical contact" between the insured and the wrongdoer as a prerequisite to recovery under the insured's uninsured motorist coverage.[67] The insured party in *Biggs* was denied her claim because she was injured when she swerved off the road in an attempt to avoid a collision with a negligent driver.[68] The court placed the insured in the shoes of the wrongdoer and held the physical contact clause unenforceable, stating:

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policies from MFA and sought to collect the $10,000 maximum recovery on each policy. *Id.* at 154.

62. *Id.*

63. The rationale is that because separate premiums were paid for the insured's uninsured motorist coverage and his medical payment coverage, the insurer was precluded from deducting medical payments from the insured's uninsured motorist recovery. *See* Sims v. National Cas. Co., 171 So. 2d 399 (Fla. Dist. Ct. App. 1965).

64. In *Keel*, the court explained that other insurance clauses are "contrary to public policy, repugnant to our uninsured motorist statute and void for. . .the appellee has paid and the appellant collected, separate premiums for each uninsured motorist coverage." 553 P.2d 153, 155 (Okla. 1976).

65. By imposition of both policies, the insured is not receiving a windfall. He has paid the insurer a premium for this protection, and is only attempting to recover the actual amount of his damages which are within the limits of both policies. On the other hand, the insurer has collected a premium for each policy. In such instance, it would be manifestly unjust to permit the insurer to avoid its statutorily imposed liability by its assertion of "other insurance clauses" which would deny the insured from receiving that for which he has paid a premium.

Id. at 156.

66. 569 P.2d 430 (Okla. 1977).

67. The insurance policy examined by the *Biggs* court provided in a relevant part that the insurer must: "[p]ay all sums which the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . . ." *Id.* at 431.

The policy defined such a vehicle as follows: "A land motor vehicle which causes bodily injury to an insured arising out of *physical contact* of such vehicle with the insured . . . at the time of the accident . . . ." *Id.* (emphasis in original).

68. *Id.*

> Since the purpose of our uninsured motorist statute is to afford the same protection to a person injured by an uninsured motorist as he would have had if the negligent motorist had carried liability insurance, it would defeat the purpose of the statute to allow insurance contracts to require impact before coverage would be extended to their insured.[69]

The Oklahoma Supreme Court recently exhibited an attitude favorable to the insured through its decision in *MFA Insurance Co. v. Hankins*.[70] In *Hankins*, the party at fault was not totally without insurance, but was simply "underinsured."[71] The court, however, stated that the Oklahoma uninsured motorist statute applied to underinsured as well as uninsured motorists, thereby expanding the scope of the insured's coverage while increasing the liability of the insurer.[72]

The *Keel*, *Biggs*, and *Hankins* decisions reveal judicial sympathy in the Oklahoma Supreme Court toward the insured. The *Keel* decision is particularly persuasive evidence that medical payment setoffs will be held invalid when challenged in an Oklahoma court, as the similarities between the stacking issue and the setoff issue often inspire the same policy arguments.[73]

The Oklahoma Legislature, also, acts as a protector of the insured.[74] Oklahoma's uninsured motorist statute was amended in 1976, adding a provision that any payment made by an underinsured tortfeasor could not be used by an insurer to limit its uninsured motorist liability toward the insured claimant.[75] This statute precludes an insurer from setting off payments made by an inadequately insured motorist against an insured's uninsured motorist coverage.[76] The type

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69. *Id.* at 433.

70. 610 P.2d 785 (Okla. 1980).

71. "Underinsured" means that the amount of the insured's coverage is below that required by statute.

72. *Id.* at 788; *see* OKLA. STAT. tit. 36, § 3636(C) (Supp. 1980) (Uninsured Motorist Coverage). The *Hankins* court, however, refused to apply § 3636(C) retroactively since the clause, as amended, was not a remedial measure, but rather a matter of substance. MFA Ins. Co. v. Hankins, 610 P.2d 785, 788 (Okla. 1980).

73. *Compare* Boettner v. State Farm Mut. Ins. Co., 388 Mich. 482, 201 N.W.2d 795 (1972) *and* Allstate Ins. Co. v. Maglish, 94 Nev. 699, 586 P.2d 313 (1978) *with* Sims v. National Cas. Co., 171 So. 2d 399 (Fla. Dist. Ct. App. 1965) *and* Van Tassel v. Horace Mann Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1978). *See generally*, Comment, *Intra-Policy Stacking of Uninsured Motorist and Medical Payments Coverages: To Be Or Not To Be*, 22 S.D.L. REV. 349 (1977).

74. *See* OKLA. STAT. tit. 36, § 3636 (Supp. 1980) (Uninsured Motorist Coverage).

75. OKLA. STAT. tit. 36, § 3636(E) (Supp. 1980) provides "that any payment made by the insured tort-feasor *shall not reduce* or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage" (emphasis added).

76. *Id.* Consider the following illustration:

Driver A is seriously injured when involved in an accident with negligent Driver B. Driver B

of setoff banned by the statute is similar to the medical payment setoff since both setoffs reveal efforts by insurers to limit the recoveries of the insured. Since the Oklahoma Legislature has sought to statutorily quash one such setoff measure used by the insurers, it is but one step away from defeating the medical payment setoff.

Even though Oklahoma statutory and case law only address issues analogous to the setoff question, they do reveal a legal climate favorable to the insured. These decisions and the amended statute strongly indicate that medical payment setoffs will be held invalid when the issue arises in an Oklahoma court.

VI. CONCLUSION

When automobile insurance was created in the 1920's, it was originally intended to cushion the harsh effects of accidents on the insured.[77] Insurers necessarily assumed a protective role in society and have been said to maintain a fiduciary relationship with their policyholders.[78] This "special relationship" between the parties to insurance contracts differs from typical contractual relationships because the insurer's obligation to the public is theoretically of greater importance than its desire to reap some financial advantage.[79]

It is in light of this special duty owed by the insurer to the insured that the propriety of medical payment setoff provisions becomes suspect. Those who support the validity of such provisions attempt to justify them by employing a plain meaning rationale.[80] This theory assumes that the parties to the contract are similarly situated, possess equal bargaining power, and deal at arms length. On the contrary, an insurance policy is not "an ordinary contract [but] is a complex instrument, unilaterally prepared and seldom understood by the insured.

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has liability coverage of $2,000, but as this amount is below the statutory minimum, he is considered underinsured. Nevertheless, Driver B's insurer pays Driver A the inadequate sum of $2,000. Driver A files a claim for $10,000 under his uninsured motorist coverage with his insurer, XYZ Insurance Company. XYZ attempts to deduct the $2,000 payment from Driver A's uninsured motorist coverage, but discovers that § 3636 precludes him from doing so. Driver A therefore enjoys a recovery of $10,000 under his uninsured motorist coverage, in addition to the $2,000 he previously received from Driver B's insurer.

77. S. KIMBALL, INSURANCE AND PUBLIC POLICY 23 (1960).

78. *See* J. MCCARTHY, PUNITIVE DAMAGES IN BAD FAITH CASES § 2.3, at 17 (1976) ("[T]he relationship that exists between insured and insurer is special, and . . . the insurer is on the level of a public utility or an enterprise affected with the public interest.").

79. *Id.* This special obligation to the insured arises partially because "the insured does not contract to obtain a commercial advantage but to protect himself against the risks of accidental losses." *Id.*

80. For a definition of the plain meaning rule, see note 26 *supra* and accompanying text.

The parties are not similarly situated. The companies . . . are expert in the field [whereas] the insured is not."[81]

Because parties to insurance contracts seldom, if ever, have equal bargaining power,[82] the plain meaning argument is misplaced when used as support for medical payment setoff provisions. This theory allows the insurer to rely on the fiction of equal bargaining power to justify its use of medical payment setoff provisions and, in so doing, abandon its role as protector.[83]

Examination of the medical payment setoff issue has revealed a clear national trend toward holding such provisions unenforceable. The manner in which analogous issues have been resolved in Oklahoma indicates that Oklahoma will follow the trend and hold such setoffs invalid. Finally, in light of the public policy which conceives of insurance as a protective device, it is logical that the medical payment setoff provision should be defeated when the issue arises in an Oklahoma court.

V. POSTSCRIPT

On December 15, 1981, the Oklahoma Supreme Court decided *Aetna Casualty & Surety Co. v. State Board for Property & Casualty Rates*.[84] This case held that title 36, section 6092 of the Oklahoma Statutes[85] prohibits the use of medical payment setoffs in any automobile liability policy, including the uninsured motorist coverage. Expanding earlier interpretations of the statute which limited its prohibition to subrogation clauses, the court followed the view expressed in this article[86] that medical payment setoff provisions should be invalidated in Oklahoma.[87]

Don S. Smith

81. Allstate Ins. Co. v. Pietrosh, 85 Nev. 310, —, 454 P.2d 106, 110 (1969).

82. J. MCCARTHY, *supra* note 78, at 16.

83. *Cf.* Schmidt v. Pacific Mut. Life Ins. Co., 268 Cal. App. 2d 735, 74 Cal. Rptr. 367 (1969) (contracts of insurance are contracts of adhesion, since there is no bargaining between equal parties).

84. 52 OKLA. B.J. 2972 (1981).

85. OKLA. STAT. tit. 36, § 6092 (1971).

86. *See* notes 73-83 *supra* and accompanying text.

87. The opinion upheld this view as expressed in 10 Okla. Op. Att'y Gen. 440 (1978) (setoff provision invalid as to medical payments on behalf of the insured or household member) and 10 Okla. Op. Att'y Gen. 559 (1978) (excess coverage exclusion is invalid in allowing setoff or subrogation to reduce automobile liability coverage by the amount of medical payments made to the insured to household member).